

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES PAUL ARANGO,

Defendant-Appellant.

UNPUBLISHED

October 6, 2009

No. 287323

Wayne Circuit Court

LC No. 05-008294

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant pleaded guilty to larceny by conversion involving \$1,000 or more but less than \$20,000, MCL 750.356(3)(a). The trial court sentenced defendant as a second habitual offender, MCL 769.10, to serve two years' probation. The court additionally ordered defendant to pay restitution, plus \$400 against the costs of his court-appointed trial attorney. Defendant appeals on delayed leave granted. For the reasons set forth in this opinion, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At the plea proceeding, which took place on May 22, 2007, defendant admitted that, early in 2005, he was a contract employee of the Society of Manufacturing Engineers in Dearborn when he took two laptop computers home without permission and never brought them back. Defendant further admitted that he converted the computers for his own use, and did so with the understanding that retaining the computers was illegal. Defendant additionally admitted that he was a habitual offender, having a 2002 conviction of embezzlement by agent of \$20,000 or more.

Sentencing was set for July 11, 2007, but defendant failed to appear, having been incarcerated for violating probation in connection with a different offense. Instead, defendant appeared for sentencing on June 4, 2008, 13 months after he offered his plea, and explained that his understanding was that his prospects for parole were bound up with the expectation that he would receive a term of probation in the instant matter.

The trial court stated that a condition of defendant's two-years' probation was that he pay half of the ordered restitution within six months, and the remainder within the following six months, and explained that he would otherwise be sentenced to a term of imprisonment of 23 months to seven and one-half years.

On appeal, defendant challenges the trial court's jurisdiction to impose sentence, and the assessment of attorney fees against him.

I. Jurisdiction

A trial court "must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law." MCR 6.425(E)(1). In this case, the original sentencing date, July 11, 2007, was less than two months after the plea date, demonstrating the trial court's conscientious adherence to this rule. However, defendant did not appear due to his incarceration in relation to a different criminal conviction. The trial court acted with reasonable promptness, but defendant's own involvement with the criminal justice system caused delay.

Defense counsel protested at sentencing, and appellate counsel reiterates on appeal, that many notices of defendant's state of incarceration were sent to the trial court, but that those notices were not acted upon. However, defendant has never offered documentary evidence to indicate that the trial court was indeed fully informed of his incarceration status. Defendant's unsupported assertions are insufficient to persuade this Court to attribute the delay to the trial court instead of to defendant.

Defendant relies exclusively on MCL 771.1, subsection (2) of which states that a court may delay sentencing for up to one year "to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency," grants the court continued jurisdiction over the matter for that time, and requires a court exercising that option to enter an order stating on the record its reasons for doing so. Subsection (3) in turn requires a court electing to delay sentencing to include within its order a provision that the Department of Corrections (DOC) "shall collect a supervision fee of not more than \$135.00 multiplied by the number of months of delay ordered, but not more than 12 months." Defendant maintains that, having delayed sentencing for more than the period authorized by that statute, the trial court was deprived of sentencing jurisdiction. We disagree.

Challenges to a court's subject matter jurisdiction may be raised at any time. *People v Richards*, 205 Mich App 438, 444; 517 NW2d 823 (1994).

In this case, there was no invocation of MCL 771.1 below, by the trial court in the first instance, or by defense counsel when sentencing did finally take place. The court entered no order delaying sentencing, explaining why, or directing the DOC to collect a supervision fee. At sentencing, defense counsel complained of notices supposedly provided but not acted upon, but made no mention of the one-year limitations of MCL 771.1, or of its provision guaranteeing the court's sentencing jurisdiction only for that period. For these reasons, defendant fails to show that MCL 771.1 is applicable. Because the record shows that the trial court's timely sentencing plans were thwarted by defendant's own continued involvement with the penal system, we must reject this jurisdictional challenge.

II. Attorney Fees

The question whether an award of attorney fees is permitted, required, or prohibited is one of law, calling for review de novo. *Rapistan Corp v Michaels*, 203 Mich App 301, 306; 511

NW2d 918 (1994). Where a trial court was legally authorized to award attorney fees, its award is reviewed on appeal for an abuse of discretion. *In re Condemnation of Private Property for Highway Purposes (Dep't of Transportation v Curis)*, 221 Mich App 136, 139-140; 561 NW2d 459 (1997). However, because defendant did not preserve this issue by timely objection below, our review is for plain error. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MCR 6.005(A) and (D) provide for publicly funded defense counsel for indigent defendants. MCR 6.005(C) in turn states, "If a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution." MCL 769.1k(1)(b)(iii) authorizes a court to include as part of a criminal sentence an assessment covering "expenses of providing legal assistance to the defendant." See also MCL 769.34(6) (authorizing a trial court, "[a]s part of the sentence," to "order the defendant to pay any combination of a fine, costs, or applicable assessments," as well as restitution as provided by law). The statute setting authorizing conditions of probation expressly provides for repayment of attorney fees. MCL 771.3(5).

Defendant protests that the trial court made no inquiry into his ability to pay any part of his attorney fees. Plaintiff counters that none of the statutes authorizing a court to require a criminal defendant to reimburse the costs of appointed counsel mentions ability to pay. Our Supreme Court recently decided this question in plaintiff's favor. *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009). The question of ability to pay arises not at sentencing, but only when enforcement of the reimbursement order begins. *Id.*, at 275. Further, remittance orders of prisoner funds generally obviate the need for an ability-to-pay assessment with relation to an imprisoned because the operative statute is structured to take money from only prisoners who are presumed not to be indigent. *Id.*, citing MCL 769.1l.

In this case, defendant provides no indication that enforcement of the provision in his judgment of sentence requiring reimbursement of attorney fees has begun, let alone that it has taken place by other than an order of remittance of prisoner funds. For these reasons, we conclude that the reimbursement order is valid on its face, and that no remand to assess defendant's ability to pay is required.

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello